IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 48 OF 2006.

Gajanan Fakir Sanghela. ... Appellant.
Versus.
Municipal Corporation of
Greater Mumbai. ... Respondent.

Shri Siddharth Karpe for the Appellant.

Shri J.J.Xavier for the Respondent.

CORAM : ABHAY S.OKA, J.

DATED : 3rd May, 2006.

P.C.:

1. Admit. The Respondent waives service. Considering the facts and circumstances of the case taken up for hearing forthwith.

2. The Appeal is by the original Plaintiff. By the impugned Judgment and order dated 25th April 2005, the suit filed by the Appellant/Plaintiff has been dismissed. The suit is dismissed on the ground that the Appellant/Plaintiff is a hawker. It is held that in view of the orders passed by the Apex Court, the City Civil Court, Mumbai, cannot deal with the matter.

3. The Appellant is holding a premises admeasuring about 160 sq.ft. situated at Juhu, Vile Parle (West), Mumbai. According to the case of the Appellant, the

suit premises is made of wooden planks on sides and there is a roof. According to the case of the Appellant, the suit premises is a censused structure. The challenge in the suit is to a notice under section 314 of the Bombay Municipal Corporation Act 1888, by which it was alleged that the suit premises is located on a road.

4. A Notice of Motion was taken out in the said suit for injunction. Ad-interim relief was granted on the said Notice of Motion. The Respondent-Corporation made an application relying upon the Judgment and Order dated 9th December 2003 passed by the Apex Court in Civil Appeal Nos.4156-4157 of 2002 (Maharashtra Ekta Hawkers Union and anr. v/s. Municipal Corporation of Greater Mumbai & others). In the said application it was stated that as per the direction issued by the Apex Court, ad-interim relief granted in favour of the Appellant will have to be vacated and the suit will have to be disposed of in terms of the order of the Apex Court. A reply was submitted by the Appellant to the said application by contending that he was holding a pitch holders card bearing census number. He stated that he was not at all a hawker. By the impugned order, ad-interim relief granted in favour of the Appellant was vacated and the suit was dismissed.

5. The learned Advocate for the Appellant submitted

that no adjudication has been made by the trial Court on the question whether the Appellant is a hawker. He submitted that the Appellant is holding a regular shop premises which does not form part of any road. He submitted that therefore, the Judgment of the Apex Court will have no application.

6. The learned Advocate for the Respondent relied upon the aforesaid decision of the Apex Court and submitted that the Appellant is a hawker. He submitted that a Committee has already been constituted by the Apex Court. The said Committee will go into the grievances of the hawkers. He submitted that the trial Court was justified in dismissing the suit.

7. I have considered the submissions. A reference will have to be made to the aforesaid decision of the Apex Court. In the first paragraph of the said decision, it is stated that the Apex Court was dealing with cases filed by large number of persons who were carrying on hawking on the street of Mumbai. The Apex Court has laid down a scheme for regulating the hawking on the streets of Mumbai. Direction No.16 issued by the Apex Court reads thus:

> (16) The scheme framed by us will have a binding effect on all concerned. Thus part from those to whom licenses will now be issued,

> no other person/body will have any right to squat or carry on any hawking or other business on the roads/street. We direct the BMC shall bring this Judgment to the notice of all Courts in which matters are now pending. We are quite sure that the concerned Court/s shall then suitably vacate/modify its injunction/stay order."

A reference will have to be made to another decision of the Apex Court in the same proceedings which was delivered on 30th July 2004. In the said decision the Apex Court observed as under:

> "We, therefore, feel it necessary to clarify that this Court is framing a scheme for hawking. Thus only this Court will hereinafter deal with this aspect. No other Court shall either interpret orders of this Court or pass any orders contrary to the orders of this Court. If any clarifications are required they must be obtained from this Court. Also if any party feels aggrieved by the effect of an order of this Court, then the remedy of that party will be to approach this Court for a clarification or variation."

The effect of the aforesaid orders of the Apex Court is

that no other Court save and except the Apex Court can deal with the matter which touches the scheme framed by the Apex Court. Therefore, the order of the trial Court is right provided it was established that the Appellant is a hawker. As pointed out earlier, a reply was filed by the Appellant to the application made by the Respondent-Corporation denying that he was a hawker. It was stated that he was holding a shop premises and also pitch-holder's card. A perusal to the decision of the trial Court shows that the trial Court has not at all gone into the question as to whether the Appellant is a hawker. If it was established that the Appellant is a hawker, the trial Court will have to adopt the course which is suggested by the Apex Court. However, the impugned order cannot be sustained as there is no adjudication made on the issue whether the Appellant is a hawker. Only on this ground the impugned order deserves to be set aside and the suit is required to be remanded to the trial Court.

8. Hence the following order is passed:

i) The impugned Judgment and order dated 25th April 2005 is quashed and set aside.

ii) S.C.Suit No.1548 of 2002 and Notice of Motion No. 1154 of 2002 are restored. The Application made by the Respondent in September 2004 is also

restored.

iii) The parties are directed to appear before the trial Court on 26th June 2006 at 11.00 a.m. The trial Court will hear and decide the Application made by the Respondent in September 2004 and in particular the issue whether the Appellant/ Plaintiff is a hawker.

iv) The trial Court will permit the parties to place necessary material on record including affidavits for deciding the aforesaid application made by the Respondent. The application shall be decided as expeditiously as possible and preferably on or before 29th September 2006.

v) If it is held that the Appellant is a hawker, it is obvious that the parties will be governed by the aforesaid decisions of the Apex Court which are referred to in paragraphs 4 and 7 above.

vii) Till the decision of the Application of the Respondent by the trial Court, ad-interim order passed by this Court on 6th May 2005 will continue to operate. If the Appellant succeeds in establishing that he is not a hawker, the ad-interim relief granted on 6th May 2005 will

continue to operate till the disposal of the Notice of Motion No.1154 of 2002.

vi) All questions on merits are kept open.

vii) The parties and the concerned Court to act on an authenticated copy of this order.

Judge.